

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

DANIEL J. DUFFY,)	
)	
Appellant,)	Case No. 09R 286
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Daniel J. Duffy ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on July 2, 2010, pursuant to an Order for Hearing and Notice of Hearing issued April 8, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Daniel J. Duffy was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2009.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely

protest, and actual value as determined by the County Board is shown in the following table:

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Description: S 52.7 N 146.7 S½ W 35 FT Lot 15 & S 52.7 N 146.7 S½ Lot 16 Park Place, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$6,700.00	\$In Total	\$6,700.00
Improvement	\$98,800.00	\$In Total	\$98,800.00
Total	\$105,500.00	\$50,000.00	\$105,500.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on April 8, 2010, set a hearing of the appeal for July 2, 2010, at 9:00 a.m. CDST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 6,700.00

Improvement value \$ 98,800.00

Total value \$105,500.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).

2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2008).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf.

IV. ANALYSIS

The subject property is an improved parcel. The improvements on the parcel are a 2 story 1,960 square foot duplex with a 980 square foot basement and a 288 square foot detached garage. (E2:9). The Taxpayer rents both sides of the duplex to others. The Taxpayer contends that

because the subject property is used exclusively for rental purposes that its actual value should be determined using the income approach.

The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, 2002, 143. The steps required for use of the income approach with direct capitalization may be summarized as: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization. *Id.* at 465. The direct capitalization method produces an indication of value based on a single year’s estimated income. *Id.* A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* Discounted cash flow analysis is a refinement of the yield capitalization method in which

cash flows and an eventual sale price are discounted at a rate to indicate a present value. *Id.* at 540.

The Taxpayer has furnished what he described as typical income and expenses for the subject property. (E5).

The Taxpayer's reliance on actual expenses of the subject property is not in accordance with generally accepted appraisal practice. "The income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 204. That position has also been adopted by Nebraska Courts. See *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 327 N.W.2d 108, (1982); *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286 (1985).

The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 481 - 483. An analysis using the actual operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only, with comparable properties. *Id.* Actual operating histories were not produced

Expenses as compiled by the taxpayer include a deduction for taxes. When property is valued for ad valorem tax purposes, taxes should not be considered an expense item." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 240. The appropriate use of taxes is to include a factor for taxes in the capitalization rate. A "loaded"

capitalization rate includes the effective tax rate. *Property Assessment Valuation*, Supra, at 233. The basis for that position is the interplay between tax rates, value, and resulting tax when a valuation estimate is developed using the income approach. The income approach at its simplest can be described as a formula in which income is divided by a capitalization rate to derive an estimate of value ($I+R=V$). Income equals the sum of income less expenses. As the formula is applied, if an expense is increased, income is reduced, and the indication of value is reduced. The inverse is true for the reduction of an expense. The reduction of an expense produces an increase in income and an increase in the value indication. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied to a stated value, the tax is determined, and a deduction is taken. The process produces a circularity in the calculations. If, for example, value is reduced, the resulting tax deduction should be reduced, producing in turn a higher indication of value when the formula is rerun. Because the objective in an ad valorem tax proceeding is to determine the value to which the tax rate is to be applied, the formula calls for use of an unknown that will be found only with the use of the unknown itself. Use of a loaded capitalization rate avoids the circularity produced by an expense deduction for taxes because the loaded capitalization rate is indifferent to the items of income or expense, the sum of which it is divided into.

Statutory provisions for determination of actual value, the levy, and payment of the resulting tax are also important considerations. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Reissue 2009). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2009). The resulting

amount of tax is then determined and a notice sent to a taxpayer. Neb. Rev. Stat. §77-1701 (Reissue 2009). The tax is due and payable on December 31 of each year. Neb. Rev. Stat. §77-203 (Reissue 2009). Payment of the tax due may be made in two installments, the first due on May 1 or April 1, and the second due on September 1 or August 1 of the year following its levy. Neb. Rev. Stat. §77-204 (Reissue 2009). If taxes are paid in the year after levy, and considered an expense item in the year paid, the taxes paid may not be those which are attributable to the year in which other expenses or income being annualized were determined. In short, one expense item, real property taxes, will be a year off the time frame of all other items if the taxes are paid immediately prior to the delinquency dates. Use of a loaded cap rate makes consideration of an adjustment to financial information unnecessary. For the reasons stated, the use of a loaded capitalization rate will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes.

After an initial determination of value the Taxpayer further reduced the estimate of value derived from use of the income approach with a lump sum adjustment for deferred maintenance. The Taxpayer has taken a lump sum deduction for deferred maintenance to arrive at an indication of value for the subject property. A lump sum deduction for deferred maintenance is not in accordance with accepted appraisal practices. An annual deduction may be taken as a “replacement allowance”. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 490. A replacement allowance is an allowance that provides for the periodic replacement of building components that wear out more rapidly than the building itself and must be replaced during the building’s economic life; sometimes referred to as reserves.” *Id.* at 460. Examples of

building components that may require a replacement allowance include: roof covering, carpeting, parking areas, etc. *Id.* at 491.

The Taxpayer testified that he choose a 12% capitalization rate by adding 2% to a commonly accepted rate of 10% for real estate. 2% was added as an adjustment for a bad neighborhood. The Taxpayer's capitalization rate is unsupported and is therefore given little weight.

The Taxpayer's opinion based on use of the income approach is not persuasive for reasons stated above.

Property must be assessed based on its actual value. Neb. Rev. Stat. 77-201 (Reissue 2009). Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (01/07). Highest and best use is defined in the rules as regulations of the Tax Commissioner as the most reasonable and probable use of the property that will support the highest present value. It is the recognition of the contribution of that specific use to the community environment or community development goals addition to wealth maximization of individual property owners. 350 Neb. Admin. Code ch10, §001.13 (1/07). The Taxpayer testified that maximum value could be obtained from the subject property on sale if it sold as an owner occupied rental property. In other words, value would be maximized if half of the duplex is used as a personal residence by the owner and the other half is rented. Value as indicated by the income approach, as presented by the Taxpayer, assumed full rental of the subject property. Valuation as proposed by the Taxpayer does not represent its value at its highest and best use.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is affirmed.
2. Actual value, for the tax year 2009, of the subject property is:

Case No. 09R 286

Land value \$ 6,700.00

Improvement value \$ 98,800.00

Total value \$105,500.00.

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on July 28, 2010.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax

Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007).

In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient

competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption

which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully

discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm. R. Wickersham, Commissioner